MUDAJAYA CORPORATION BHD v. KWSL BUILDERS SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[ORIGINATING SUMMONS NOS: BA-24C-52-08-2022 & BA-24C-56-08-2022]
6 MARCH 2023

Abstract – *The courts, in deciding whether an adjudicator had breached the second rule of natural justice under s. 15(b) read with s. 24(c) of the Construction Industry Payment and Adjudication Act 2012, may consider the three scenarios elucidated in the Singapore case of Glaziers Engineering Pte Ltd v. WCS Engineering Construction Pte Ltd.*

CONSTRUCTION LAW: *Adjudication decision – Setting aside – Application for – Whether adjudicator breached second rule of natural justice under s. 15(b) read with s. 24(c) of Construction Industry Payment and Adjudication Act 2012 – Whether adjudicator's rejection of defence/set off/counterclaim/cross-claim amounted to breach of second rule – Whether only required to decide on all defences, set-off, counterclaim and/or cross-claim raised in a payment response and adjudication response – Whether adjudicated matters could have been reasonably foreseen*

CONSTRUCTION LAW: *Adjudication decision – Stay – Absolute stay of enforcement – Whether there was clear and unequivocal error in adjudication decision – Whether conditional stay ought to be allowed – Whether against object of Construction Industry Payment and Adjudication Act 2012 to allow conditional stay – Whether only allowed in exceptional circumstances – Whether non-disruption of cash flow forms an exceptional circumstance to allow conditional stay – Construction Industry Payment and Adjudication Act 2012, s. 16(1)(b) & (2)*

Mudajaya Corporation Sdn Bhd ('MCB') appointed KWSL Builders Sdn Bhd ('KWSL') to do subcontract works ('works') in the same construction project. When disputes arose between MCB and KWSL regarding the works: (i) MCB's suit was filed; (ii) prior to the adjudication decision on 29 July 2022 ('AD of 29 July 2022'), KWSL commenced three adjudication proceedings against MCB and obtained three adjudication decisions ('three ADs') dated 19 January 2022, 2 March 2022 and 21 March 2022. With regard to the ADs dated 19 January 2022 and 2 March 2022: (i) MCB filed two applications to set aside the ADs; (ii) MCB filed two applications to stay the enforcement of the ADs pending the disposal of MCB's suit; and (iii) KWSL filed two applications for leave of court to enforce the two ADs. In respect of the AD dated 21 March 2022 (i) MCB applied to set aside the

AD; (ii) MCB had also filed an application to stay the enforcement of the AD pending the disposal of MCB's Suit; and (iii) KWSL filed an application for leave of court to enforce the AD. In the two originating summons ('OS') herein: (i) KWSL claimed that, among others, MCB had not paid a total sum of RM3,003,735.65 for architectural works which had been performed by KWSL for MCB; and (ii) the AD of 29 July 2022 determined that MCB should pay to KWSL a sum of RM2,566,622.15 with interest and adjudication costs as stipulated in the AD of 29 July 2022. The issues for the court's determination were: (i) in order to determine whether an adjudicator has breached the second rule of natural justice (second rule) under s. 15(b) read with s. 24(c) of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') when the adjudicator arrives at an AD, should the courts adopt the approach applied in Singapore's Court of Appeal's case of *Glaziers Engineering Pte Ltd v. WCS Engineering Construction Pte Ltd* ('*Glaziers Engineering*') and the three scenarios explained in that case; (ii) in an application for an absolute stay of the enforcement of an AD pending the disposal of litigation or arbitration between the parties, could the court consider an oral application for a 'conditional stay' of the enforcement of the AD pending the outcome of the litigation/arbitration ('conditional stay application'); and (iii) in the exercise of the court's discretion to decide a conditional stay application, whether the court may consider the fact that there were previous court orders under s. 28(1) and (2) of the CIPAA which had allowed the enforcement of three ADs between the same parties involved in the conditional stay application.

Held (dismissing MCB's OS and allowing KWSL's OS subject to conditional stay order):

(1) The adjudicator had not breached the second rule as: (i) the second rule only confers a right on parties in adjudication proceedings to adduce evidence and to submit on any issue which arises in the adjudication proceedings. In this case, the adjudicator had given MCB its right to adduce evidence and to submit on all matters which arose in the adjudication proceedings. An adjudicator was only required by the second rule to decide on all defences, set-off, counterclaim and/or cross-claim raised in a payment response and adjudication response. The adjudicator's rejection of MCB's defence/set off/counterclaim/cross-claim, in itself, did not amount to a breach of the second rule. (paras 11 & 12)

(2) The two adjudicated matters raised for MCB, *ie*: (i) the adjudicator rejected MCB's alleged back charges based on MCB's alleged failure to plead back charges; and (ii) by reason of s. 56(3) of the Contracts Act 1950, the adjudicator dismissed MCB's liquidated damages claim, did not fall within the first and second scenario in *Glaziers Engineering*. The two adjudicated matters fell within the third scenario in *Glaziers*

Engineering because: (i) MCB could have reasonably foreseen that the two adjudicated matters would form part of the AD of 29 July 2022; and (ii) the two adjudicated matters were 'reasonably connected to the submission made by MCB and KWSL to the adjudicator. (para 12)

(3) Even if the adjudicator had breached the second rule ('breach') with regard to the two adjudicated matters, this court would not exercise its discretion under ss. 15(b) and 24(c) of the CIPAA to set aside the AD of 29 July 2022 because: (i) there was no 'real possibility' that without the breach, the adjudicator would have arrived at a decision which would be different from the AD of 29 July 2022; and (ii) the breach was neither 'decisive' nor 'material' to the AD of 29 July 2022 so as to persuade the court to set it aside. (para 13)

(4) The court may exercise its discretion under s. 16(1)(b) of the CIPAA to grant an absolute stay of the enforcement of an adjudication decision pending the disposal of litigation/arbitration when there is a clear and unequivocal error in the AD or it is just for the court to grant an absolute stay of the AD. There was no clear and unequivocal error in the AD of 29 July 2022 nor was it just for the court to allow the absolute stay application, because KWSL had been deprived of cash flow since MCB's refusal to pay for the architectural works which had been completed by KWSL. In the circumstances, the absolute stay application was dismissed. (paras 16 & 17)

(5) As a general rule, the court should not exercise its discretion to allow a conditional stay application because the object of the CIPAA is to ensure that parties who have performed 'construction work' are paid for the construction work and are not deprived of cash flow. However, the court may depart from the general rule if there exists an exceptional circumstance. The court took judicial notice of the three enforcement orders granting leave for KWSL to enforce the three ADs and therefore, KWSL was entitled to enforce against MCB the three ADs. As KWSL could enforce against MSB the total adjudicated amount and total interest and adjudication costs, KWSL's cash flow would not be disrupted. In view of this exceptional circumstance, the court exercised the discretion under s. 16(1)(b) read with (2) of the CIPAA to make the conditional stay order. (paras 23-25)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] 1 LNS 1522 CA ***(refd)***

CDI v. CDIJ [2020] 5 SLR 484 ***(refd)***

Glaziers Engineering Pte Ltd v. WCS Engineering Construction Pte Ltd [2018] 2 SLR 1311 ***(foll)***

Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd & Another Appeal [2019] 1 CLJ 592 CA ***(refd)***

Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd [2021] 1 LNS 1620 HC ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***
Prestij Mega Construction Sdn Bhd v. Personal Representative Of Estate Of Vinayak Pradhan Prabhakar (Deceased) & Ors And Other Cases [2021] 1 LNS 235 HC ***(refd)***
Range Construction Pte Ltd v. Goldbell Engineering Pte Ltd [2021] 2 SLR 91 ***(refd)***
Ranhill E & C Sdn Bhd v. Tioxide (M) Sdn Bhd & Other Cases [2015] 1 LNS 1435 ***(refd)***
Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Case [2017] 1 LNS 1648 HC ***(refd)***
Uzma Engineering Sdn Bhd v. Khan Co Ltd & Other Cases [2020] 1 LNS 1153 HC ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 56(3)
Construction Industry Payment and Adjudication Act 2012, ss. 4, 5, 6, 10, 15(b), 16(1)(b), (2), 24(c), 28(1), (2)
Rules of Court 2012, O. 1A, O. 2 r. 1(2), O. 18

For the plaintiff - Serene Hiew Mun Yi & Pan Yan Teng; M/s Harold & Lam Partnership
For the defendant - Michael Yap Chih Hong & Haikaldin Mahyidin; M/s Tommy Thomas

Reported by S Barathi

JUDGMENT

Wong Kian Kheong J:

Three Novel Matters

[1] This judgment regarding the above two originating summonses (two OS) discusses three novel issues as follows:

(i) to determine whether an adjudicator has breached the second rule of natural justice (second rule) under s. 15(b) read with s. 24(c) of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) when the adjudicator arrives at an adjudication decision, should our courts adopt the approach applied by Steven Chong Horng Siong JA in Singapore's Court of Appeal case of *Glaziers Engineering Pte Ltd v. WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 and the three scenarios explained in that case (three scenarios)?;

(ii) in an application for an absolute stay of the enforcement of an adjudication decision (absolute stay application) pending the disposal of litigation or arbitration between the parties (litigation/arbitration), can the court consider an oral application by learned counsel for a "conditional stay" of the enforcement of the adjudication decision pending the outcome of litigation/arbitration (conditional stay application); and

(iii) in the exercise of the court's discretion to decide a conditional stay application, whether the court may consider the fact that there were previous court orders under s. 28(1) and (2) of the CIPAA which have allowed the enforcement of three earlier adjudication decisions between the same parties involved in the conditional stay application.

Two OS

[2] The two OS to be decided by this court are as follows:

(i) Mudajaya Corporation Sdn Bhd (MCB) has filed OS No. BA-24C-52-08/2022 (MCB's OS) against KWSL Builders Sdn Bhd (KSWL) for the following orders:

(a) an order to set aside an adjudication decision made on 29 July 2022 (adjudication decision (29 July 2022)) by an adjudicator, Mr Soh Lieh Sieng (adjudicator), in favour of KWSL against MCB (setting aside application (MCB's OS)); and

(b) as an alternative to the setting aside application (MCB's OS), an order to stay the enforcement of the adjudication decision (MCB's OS) (absolute stay application (MCB's OS)) pending the disposal of a High Court suit filed by MCB against KWSL (MCB's suit). MCB's suit was initially filed in Kuala Lumpur High Court (KLHC) Civil Suit No. WA-22C-88-09/2020. By an order of KLHC, MCB's suit had been transferred from KLHC to the Ipoh High Court (Civil Suit No. AA-22C-1-09/2021); and

(ii) OS No. BA-24C-13-02/2022 (KWSL's OS) has been filed by KWSL against MCB for leave of court to enforce the adjudication decision (29 July 2022).

Background

[3] MCB had appointed KWSL to do the following subcontract works (works) in the same construction project (project):

(i) in "letter of award" (LA) dated 20 July 2016, MCB had appointed KWSL to do "acoustic elements" works (acoustic elements works);

(ii) by way of LA dated 30 August 2016, MCB had appointed KWSL to perform infrastructural works (infrastructural works);

(iii) KWSL was appointed by MCB in LA dated 18 October 2016 to supply and install reinforced concrete walkway (walkway works);

(iv) in LA dated 31 October 2016, MCB had appointed KWSL to perform "architectural works" (architectural works); and

(v) by way of a LA dated 28 March 2017, MCB had appointed KWSL to supply manpower services for the project (manpower supply).

[4] Disputes arose between MCB and KWSL regarding the works. Consequently:

(i) MCB's suit was filed;

(ii) prior to the adjudication decision (29 July 2022), KWSL commenced three adjudication proceedings against MCB and obtained the following three adjudication decisions (three previous adjudication decisions):

(a) with regard to the walkway works, on 19 January 2022, Dr Wendy Ooi Su Ghee had adjudicated that MCB shall pay to KWSL a sum of RM500,736.24 (adjudicated amount (19 January 2022)) with interest and adjudication costs (adjudication decision (19 January 2022));

(b) on 2 March 2022, Mr Raja Kumar Raja Kandan delivered an adjudication decision (adjudication decision (2 March 2022)) wherein MCB shall pay to KWSL an amount of RM490,881.76 with interest and adjudication costs (adjudicated amount (2 March 2022)); and

(c) in respect of the acoustic elements works, Ms Janice Tay had adjudicated on 21 March 2022 that a sum of RM2,342,148.98 with interest and adjudication costs (adjudicated amount (21 March 2022)) shall be paid by MCB to KWSL (adjudication decision (21 March 2022));

(iii) with regard to the adjudication decision (19 January 2022) and adjudication decision (2 March 2022) (collectively referred to in this judgment as "two adjudication decisions (19 January 2022 and 2 March 2022)"):

(a) MCB had filed two applications to set aside the two adjudication decisions (19 January 2022 and 2 March 2022) (MCB's two setting aside applications (two adjudication decisions (19 January 2022 and 2 March 2022)));

(b) two applications had been filed by MCB to stay the enforcement of the two adjudication decisions (19 January 2022 and 2 March 2022) pending the disposal of MCB's suit (MCB's two absolute stay applications (two adjudication decisions (19 January 2022 and 2 March 2022)));

(c) KWSL had filed two applications for leave of court to enforce the two adjudication decisions (19 January 2022 and 2 March 2022) (KWSL's two enforcement applications (two adjudication decisions (19 January 2022 and 2 March 2022)));

(d) I have delivered a written judgment in [2022] MLJU 1931 as follows, among others (High Court's judgment (two adjudication decisions (19 January 2022 and 2 March 2022))):

(1) MCB's two setting aside applications (two adjudication decisions (19 January 2022 and 2 March 2022)) were dismissed;

(2) I have refused MCB's two absolute stay applications (two adjudication decisions (19 January 2022 and 2 March 2022)); and

(3) KWSL's two enforcement applications (two adjudication decisions (19 January 2022 and 2 March 2022)) were allowed (High Court's two enforcement orders (two adjudication decisions (19 January 2022 and 2 March 2022))); and

(e) MCB had initially appealed to the Court of Appeal against the High Court's judgment (two adjudication decisions (19 January 2022 and 2 March 2022) but this appeal was subsequently withdrawn; and

(iv) in respect of the adjudication decision (21 March 2022):

(i) MCB had applied to the High Court to set aside the adjudication decision (21 March 2022) (MCB's setting aside application (adjudication decision (21 March 2022)));

(ii) MCB had also filed an application to stay the enforcement of the adjudication decision (21 March 2022) pending the disposal of MCB's suit (MCB's absolute stay application (adjudication decision (21 March 2022)));

(iii) an application was filed by KWSL for leave of court to enforce the adjudication decision (21 March 2022) (KWSL's enforcement application (adjudication decisions (21 March 2022))); and

(iv) I have decided as follows, among others (High Court's decision (adjudication decision (21 March 2022))):

(1) MCB's setting aside application (adjudication decision (21 March 2022)) and MCB's absolute stay application (adjudication decision (21 March 2022)) were rejected; and

(2) KWSL's enforcement application (adjudication decision (21 March 2022) was allowed (High Court's enforcement order (adjudication decision (21 March 2022))).

MCB did not appeal to the Court of Appeal against the High Court's decision (adjudication decision (21 March 2022)).

[5] These two OS concern the following matters:

(i) KWSL claimed that, among others, MCB had not paid a total sum of RM3,003,735.65 for architectural works which had been performed by KWSL for MCB; and

A (ii) the adjudication decision (29 July 2022) determined that MCB shall pay to KWSL a sum of RM2,566,622.15 (adjudicated amount (29 July 2022)) with interest and adjudication costs as stipulated in the adjudication decision (29 July 2022).

[6] By consent of parties, I adopt the following approach:

B (i) the court will first decide the setting aside application (MCB's OS);

(ii) if I allow the setting aside application (MCB's OS), both the absolute stay application (MCB's OS) and KWSL's OS have to be dismissed as a corollary;

C (iii) if the setting aside application (MCB's OS) is dismissed, I will consider the absolute stay application (MCB's OS);

(iv) if the court allows the absolute stay application (MCB's OS), I cannot allow KWSL's OS; and

D (v) KWSL's OS will be lastly determined in the event the court refuses the absolute stay application (MCB's OS).

[7] On the date of the oral decision of the two OS (court's oral decision), MCB's learned counsel, Ms Serene Hiew Mun Yi, made an oral application for a conditional stay of the adjudication decision (29 July 2022) pending the E disposal of MCB's suit (MCB's oral application (conditional stay)). According to Ms Hiew, if the setting aside application (MCB's OS) and absolute stay application (MCB's OS) were dismissed by the court, the court should allow MCB's oral application (conditional stay) by staying the enforcement of the adjudication decision (29 July 2022) on the condition that F KWSL would deposit the adjudicated amount (29 July 2022) in an interest-bearing bank account in the name of KWSL's solicitors pending the disposal of MCB's suit.

[8] KWSL's learned counsel, Mr Michael Yap Chih Hong, informed the court that he had no instructions from his client regarding MCB's oral G application (conditional stay). This is understandable as Ms Hiew only informed the court and Mr Yap regarding MCB's oral application (conditional stay) on the very day of the court's oral decision. I will discuss MCB's oral application (conditional stay) in part F(2) below.

H **Whether Setting Aside Application (MCB's OS) Should Be Allowed**

[9] According to Ms Hiew, among others, the adjudicator had breached the second rule as follows:

(i) in respect of back charges imposed by MCB on KWSL regarding the works (MCB's alleged back charges):

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(a) the adjudicator failed to deduct or set off MCB's alleged back charges from KWSL's claim when the adjudicator decided that MCB's alleged back charges had not been "pleaded" by MCB in the adjudication proceedings (MCB's alleged failure to plead back charges);

(b) KWSL did not submit to the adjudicator regarding MCB's alleged failure to plead back charges; and

(c) the adjudicator did not invite any submission from MCB before deciding on MCB's alleged failure to plead back charges; and

(ii) the adjudicator dismissed MCB's defence or cross-claim based on liquidated damages (MCB's LD claim) due to the application of s. 56(3) of the Contracts Act 1950 (CA). Neither MCB nor KWSL had relied on s. 56(3) of the CA regarding MCB's LD claim. Hence, the adjudicator had deprived MCB of its right or opportunity to submit on the application of s. 56(3) of the CA in respect of MCB's LD claim.

[10] Mr Yap had submitted that the adjudicator did not breach the second rule in this case. According to Mr Yap, among others:

(i) this court should adopt the approach laid down in *Glaziers Engineering*, at [55] to [65], as follows:

(1) *An omission to invite submissions on the applicable standard of persuasion or proof is not a breach of the fair hearing rule*:

…

[55] … *The courts should be mindful that a surprising outcome may be the product of several distinct types of situations, some of which may not involve any breach of natural justice at all (see [56]-[63] below). The true question is whether the parties have been deprived of a fair opportunity to be heard (see Soh Beng Tee at [43] and The Royal Bank of Scotland NV v. TT International Ltd [2015] 5 SLR 1104 at [73] and [77]). Here we speak of fairness not in terms of equal treatment between the parties, but in terms of reasonableness. At the risk of stating the obvious, a fair and reasonable opportunity of being heard may or may not require a decision-maker to take the overt step of inviting submissions from the parties on a given issue.*

[56] *We shall illustrate the above propositions by discussing three distinct types of proceedings which may result in surprising outcomes. First, the outcome of a dispute may be surprising to the parties because although they each have addressed the particular question which the decision-maker has posed as a decisive issue, the decision-maker has ultimately answered that question in a way that is so far removed from any position which the parties have adopted that neither of them could have contemplated the result. An example of this was seen in Pacific Recreation, where the point in issue was the governing law of a deed. Both parties had addressed this issue – the respondents had submitted that the deed was governed by Singapore law*

while the appellants had submitted that the deed was governed by Chinese law – but neither party had suggested or contemplated what the judge eventually decided – which was that the governing law was US law.

[57] *On appeal, this court found that the appellants had been deprived of their right to be heard on a decisive issue because they had no opportunity to raise arguments as to why US law was inapplicable, or alternatively, why US law also supported their interpretation of the deed (Pacific Recreation* at [33]-[34]). *In such a situation, the parties were rightly said to have had no fair opportunity to be heard because although they knew the question which was of decisive importance (ie, the governing law of the deed), they (a) did not know; and (b) could not reasonably have expected that the judge may have answered the question in the way that she did. Natural justice required that if the judge took the view that neither Chinese law nor Singapore law were satisfactory alternatives, she ought to have invited the parties to make submissions on whether US law was the governing law, and if so, what the applicable principles were (at [34]). This must be so because the content of each party's submissions would in turn depend on the applicable governing law.*

[58] *Alternatively, the outcome of a dispute may be surprising to the parties by reason of the fact that they have not even addressed the very question which the decision-maker has posed as being a decisive issue, because they (a) did not know; and (b) could not reasonably have expected that it would be in issue at all. An example of this may be seen in the case of The Vimeira [1984] 2 Lloyd's Rep 66, where the issue in dispute was whether a particular port where a ship had docked to discharge was unsafe for the vessel. The parties argued the case on the basis that the decisive issue was whether there was sufficient water in the port for the ship to dock safely. The arbitrators, however, decided that the port was unsafe because the turning area was unduly restrictive for the vessel, notwithstanding that this issue had not been raised in the pleadings.*

[59] *The English Court of Appeal held that this amounted to a breach of natural justice, Robert Goff LJ stating that it was unfair for the arbitrators "to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it" (at 75). In our view, the court rightly found that the parties did not have a fair opportunity to be heard on the issue of the adequacy of the turning area for the vessel. Such a finding is necessarily fact-sensitive and would be a function of the evidence before the arbitrator. The parties did not have an opportunity to adduce evidence or address the arbitrator because they were subjectively unaware that the adequacy of the turning area was an issue at all. They did not have a fair opportunity because they objectively could not have reasonably foreseen that it was a live issue. In such situations, the arbitrator would be in breach of natural justice unless he has taken the step of inviting submissions on that issue.*

[60] *The final type of situation is where the outcome of a dispute is surprising to the parties because they have omitted to address a particular issue even though they could reasonably have foreseen that the issue would form part of the court's decision. The parties may have chosen not to address the issue*

because they failed to apply their minds to it, or failed to appreciate its significance, or because they each assumed that the decision-maker would adopt their position on that issue. Whatever the case may be, this type of decision cannot be set aside on the basis of any breach of natural justice because if the parties could reasonably have foreseen that the issue would arise, and if they choose not to address that issue, they cannot complain that they have been deprived of a fair hearing.

[61] *One type of case which comes within this category are those where the decision-maker has decided the dispute on a premise which, though not directly raised by the parties, is reasonably connected to an argument which the parties have raised (see TMM ([46] supra) at [63]). In TMM, the key issue in dispute between a ship purchaser and a ship seller was whether the ship purchaser was entitled to terminate the contract on the basis of an alleged repudiatory breach on the ship seller's part. Central to this question was whether the term which the ship seller had breached ("clause 11") was a condition of the contract. The ship purchaser alleged that clause 11 was a condition, whereas the ship seller alleged that it was an innominate term. The dispute was referred to arbitration and the arbitrator found that clause 11 was not a condition, but a collateral warranty. The ship purchaser sought to have the arbitrator's decision set aside, alleging that he had breached the rules of natural justice by deciding the case on the basis that the term was a collateral warranty, when neither party had advanced that case.*

[62] *On the facts, Chan J held that it was in fact the ship seller's case before the arbitrator that clause 11 was a warranty (at [68]). He thus dismissed the application to have the decision set aside. Going further, however, he held that even if the only issue put before the arbitrator was whether clause 11 was a condition or an innominate term, the arbitrator could not be said to have deprived the ship purchaser of its right to be heard. This was because the finding that clause 11 was a collateral warranty was not only reasonably connected to the arguments raised by the parties, but was a reasonable follow-through from the arbitrator's finding that clause 11 was not a condition (at [70]).*

[63] *In our judgment, the present case comes within this category of cases where the parties are precluded from complaining of a breach of the fair hearing rule because they ought reasonably to have foreseen that the issue in question (here, the applicable standard of persuasion) would arise, but failed to make submissions on the point. Indeed, it is a gross understatement to say that the parties could "reasonably foresee" that the issue of the standard of persuasion would arise, or that the issue was "reasonably connected" to arguments raised by the parties. Rather, the standard of persuasion was so integral and crucial to the adjudicator's very task of determining the dispute that there was no way he could have decided the dispute without coming to a position on the standard to be applied. In an adversarial decision-making process, it is inherently the remit of the decision-maker to assess the evidence against some standard of proof or persuasion. Therefore, the parties may well have been surprised by the view that the adjudicator formed as to the applicable standard, but they could not have been surprised that he had to form a view on this very point.*

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> [64] *Seen in this light, it could not have been a breach for the adjudicator to have omitted to invite submissions from the parties as to the applicable standard of persuasion. The applicable standard was a question so obviously crucial to his determination that he was not obliged to highlight to the parties that it would be a live issue. If the parties decided not to address it, knowingly or otherwise, they cannot complain that they had no fair or reasonable opportunity to be heard. We would thus qualify the Judge's observation that an adjudicator must comply with the principles of natural justice not only with regard to the ultimate issue before him but also with regard to the "subsidiary issues on the path to his decision on the ultimate issue" (GD ([3] supra) at [60]). While it is undoubtedly true that a decision-maker must adhere to the principles of natural justice even in dealing with subsidiary issues, this does not necessarily mean that the decision-maker must specifically invite submissions or hear from the parties on all subsidiary issues if the subsidiary issues ought reasonably to have been foreseen by the parties.*
>
> [65] *In summary, it is not a breach of the fair hearing rule for a decision-maker to fail to invite submissions on an issue as fundamental and inherent in every legal dispute as that of the standard of persuasion or proof to be applied.*
>
> (emphasis added)

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(ii) *Glaziers Engineering* has been applied in the following two cases in Singapore:

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(a) in the Court of Appeal case of *Range Construction Pte Ltd v. Goldbell Engineering Pte Ltd* [2021] 2 SLR 91, at [60], Steven Chong JCA (the abbreviation "JCA" has now replaced the abbreviation "JA" for Judges of Singapore's Court of Appeal) has decided as follows:

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> [60] *... It is not the duty of an adjudicator to invite submissions on each and every issue that might arise in adjudication proceedings (see Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd [2018] 2 SLR 1311).*
>
> (emphasis added)

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(b) in *CDI v. CDIJ* [2020] 5 SLR 484, at [67] and [68], S Mohan JC (as he then was) has decided as follows in the High Court:

> [67] *The Plaintiff submitted that the case before me is a Type Three scenario. According to the Plaintiff, cl. 15 of the MOA could reasonably be expected to be relevant to the determination of whether pre-contractual evidence may be admitted to aid in the interpretation of the terms of the MOA. The Defendant, on the other hand, submitted that the case fell within either a Type One or Type Two scenario. The Defendant argued that this was not a Type Three scenario because the Arbitrator relied on cl. 15 of the MOA to exclude pre-contractual evidence when neither party had submitted on the impact of cl 15. According to the Defendant, there was no reason to think that the Arbitrator would adopt that reasoning, as cl. 15 excluded only prior agreements and not pre-contractual evidence. The Defendant reiterated that pre-contractual evidence was a central feature of the Arbitration.*

H

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> [68] *In my view, the present case bears a closer resemblance to a Type Three scenario and therefore, enforcement of the Award should not be refused as there was no breach of natural justice.* (emphasis added)

[11] Firstly, contrary to Ms Hiew's contention, there are no "pleadings" in a "payment claim" (provided in s. 5 of the CIPAA) and a "payment response" (PR) (provided by s. 6 of the CIPAA) as understood in O. 18 of the Rules of Court 2012 (RC) – please refer to *Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd* [2021] 1 LNS 1620; [2021] 6 MLRH 540, at [26].

[12] I am of the view that the adjudicator had not breached the second rule in this case. My reasons are as follows:

(i) the second rule only confers a right on parties in adjudication proceedings to adduce evidence and to submit on any issue which arises in the adjudication proceedings – please refer to the Court of Appeal's judgment delivered by David Wong Dak Wah JCA (as he then was) in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] 1 LNS 1522; [2016] MLJU 1776, at [20]. In this case, the adjudicator had given MCB its right to adduce evidence and to submit on all matters which arose in the adjudication proceedings;

(ii) an adjudicator was only required by the second rule to decide on all defences, set-off, counterclaim and/or cross claim (defence/set off/counterclaim/cross-claim) raised in a PR and "adjudication response" (provided in s. 10 of the CIPAA). It is decided in *Prestij Mega Construction Sdn Bhd v. Personal Representative Of Estate Of Vinayak Pradhan Prabhakar (Deceased) & Ors And Other Cases* [2021] 1 LNS 235; [2021] 11 MLJ 581, at [69], as follows:

> [69] *Firstly, View Esteem, at [65], [66] and [74], has decided that an adjudicator would have breached the second rule if the adjudicator did not consider a defence raised in the adjudication proceedings. View Esteem did not however decide that an adjudicator must address each and every submission made by parties in the AD. This is understandable because by virtue of s. 12(2)(a) to (c) CIPAA, an adjudicator has to deliver an adjudication decision within a tight timeline. Furthermore, the Object (CIPAA) can only be attained if adjudicators deliver AD's expeditiously so as to ensure that parties who perform construction work are not deprived of cash flow in the form of payment for their construction work.* (emphasis added)

(iii) the adjudicator's rejection of MCB's defence/set off/counterclaim/cross-claim, in itself, did not amount to a breach of the second rule – please refer to *Mudajaya Corporation*, at [34(2)]; and

(iv) *Glaziers Engineering* and *Range Construction* concern cases under Singapore's Building and Construction Industry Security of Payment Act 2004 which is similar (not identical) to our CIPAA. *CDI* is a case regarding an arbitral award.

I am of the view that in deciding whether an adjudicator has breached the second rule in reaching an adjudication decision, our courts may consider the three scenarios as elucidated in *Glaziers Engineering*.

Ms Hiew has contended that the adjudicator should have invited submission from MCB before the adjudicator decided on the following two matters (two adjudicated matters):

(a) the adjudicator rejected MCB's alleged back charges based on MCB's alleged failure to plead back charges; and

(b) by reason of s. 56(3) of the CA, the adjudicator dismissed MCB's LD claim.

With regard to the two adjudicated matters, premised on *Glaziers Engineering*, I have no hesitation to decide as follows:

(1) the two adjudicated matters were not "so far removed from any position which (MCB and KWSL) have adopted that neither of them could have contemplated the result" in the form of an adjudication decision (29 July 2022). It is thus clear that the two adjudicated matters did not fall within the first scenario as explained in *Glaziers Engineering*;

(2) the two adjudicated matters could not come within the second scenario as described in *Glaziers Engineering*. This is because firstly, the two adjudicated matters concerned issues regarding MCB's alleged back charges and MCB's LD claim which had been posed to the adjudicator (two issues). Secondly, MCB had submitted at length to the adjudicator on the two issues. MCB could not therefore deny knowledge of the two issues. Nor could it be said that MCB could not have reasonably expected the two issues to be decided by the adjudicator; and

(3) the two adjudicated matters fell within the third scenario as stated in *Glaziers Engineering* because firstly, MCB could have reasonably foreseen that the two adjudicated matters would form part of the adjudication decision (29 July 2022). Secondly, the two adjudicated matters were "reasonably connected" to the submissions made by MCB and KWSL to the adjudicator. Consequently, MCB cannot now complain that the adjudicator did not invite MCB to submit on the two adjudicated matters which could have been reasonably foreseen by MCB in the first place.

[13] In any event, even if it is assumed that the adjudicator had breached the second rule with regard to the two adjudicated matters (breach (second rule)), this court will not exercise its discretion under ss. 15(b) and 24(c) of the CIPAA to set aside the adjudication decision (29 July 2022) because:

(i) there is no "real possibility" that without the breach (second rule), the adjudicator would have arrived at a decision which would be different from the adjudication decision (29 July 2022) – please refer to the Court of Appeal's judgment delivered by Harmindar Singh JCA (as he then was) in *Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd & Another Appeal* [2019] 1 CLJ 592, at [32]; and

(ii) as explained by Mary Lim Thiam Suan J (as she then was) in the High Court in *Ranhill E & C Sdn Bhd v. Tioxide (M) Sdn Bhd & Other Cases* [2015] 1 LNS 1435, at [82], the breach (second rule) is neither "decisive" nor "material" to the adjudication decision (29 July 2022) so as to persuade the court to set aside the adjudication decision (29 July 2022).

[14] Based on the reasons stated in the above paras. 12 and 13, the setting aside application (MCB's OS) must be dismissed.

Should Court Allow Absolute Stay Application (MCB's OS)?

[15] I reproduce below s. 16 of the CIPAA:

> *Stay of adjudication decision*
>
> 16(1) *A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:*
>
> (a) *an application to set aside the adjudication decision under section 15 has been made; or*
>
> (b) *the subject matter of the adjudication decision is pending final determination by arbitration or the court.*
>
> (2) *The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.* (emphasis added)

[16] In the Federal Court case of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479, at [79] and [82], Zulkefli PCA has decided that the court may exercise its discretion under s. 16(1)(b) of the CIPAA to grant an absolute stay of the enforcement of an adjudication decision pending the disposal of litigation/arbitration when:

(i) there is a clear and unequivocal error in the adjudication decision; or

(ii) it is just for the court to grant an absolute stay of the adjudication decision.

[17] In this case, as correctly submitted by Mr Yap, there was no clear and unequivocal error in the adjudication decision (29 July 2022). Nor is it just for the court to allow the absolute stay application (MCB's OS) because KWSL had been deprived of cash flow since MCB's refusal to pay for the architectural works which had been completed by KWSL. In the circumstances, I am constrained to dismiss the absolute stay application (MCB's OS).

MCB's Oral Application (Conditional Stay)

Whether MCB Could Make An Oral Application For Conditional Stay Of Adjudication Decision (29 July 2022)

[18] Prayer 4 of MCB's OS has applied for any relief which the court finds appropriate and fit (MCB's general prayer for relief).

[19] It is decided in *Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Case* [2017] 1 LNS 1648; [2019] 7 MLJ 175, at [128], as follows:

> [128] *Firstly, the two SOC's have prayed for "further and/or other relief" as the court deems fit and proper (General Prayer For Relief). The following appellate cases have decided that the court may grant any remedy in the interest of justice pursuant to a General Prayer For Relief*:
>
> (1) *Salleh Abas FJ's (as he then was) judgment in the Federal Court case of Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ (Rep) 190, at 198;
>
> (2) *the Court of Appeal's decision delivered by Gopal Sri Ram JCA (as he then was) in Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, at 814-815;
>
> (3) *the majority judgment in the Court of Appeal given by Zainun Ali JCA (as she then was) in Pentadbir Tanah Daerah Pontian & Ors v. Ossons Ventures Sdn Bhd* [2009] 6 CLJ 713, at 723-724; *and*
>
> (4) *Abdul Aziz Abd Rahim JCA's judgment in the Court of Appeal case of Zulkiflee bin SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2014] 3 MLJ 553, at para. 64. (emphasis added)

[20] Premised on MCB's general prayer for relief and the above appellate cases, this court may consider MCB's oral application (conditional stay). Furthermore, by virtue of O. 1A and O. 2 r. 1(2) of the RC, in the court's administration of RC so as to achieve justice in these two OS, the court is not shackled by any technical non-compliance with RC. Order 1A and O. 2 r. 1(2) of the RC provide as follows:

> *Regard shall be to justice*
>
> O. 1A *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.*
>
> *Non-compliance with Rules*
>
> O. 2 r. 1(1) ...
>
> (2) *These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective*. (emphasis added)

Should Court Exercise Discretion To Allow MCB's Oral Application (Conditional Stay)?

[21] Firstly, *View Esteem* concerns the court's discretionary power to grant an absolute stay of enforcement of an adjudication decision pending the disposal of litigation/arbitration. The issue regarding the exercise of the court's discretion pursuant to s. 16(1)(b) and (2) of the CIPAA to grant a conditional stay of enforcement of an adjudication decision pending the disposal of litigation/arbitration did not arise in *View Esteem*.

[22] It is decided in *Uzma Engineering Sdn Bhd v. Khan Co Ltd & Other Cases* [2020] 1 LNS 1153; [2020] MLJU 1272, at [43], that the court has a discretion under s. 16(1)(b) read with (2) od the CIPAA to order a conditional stay of enforcement of an adjudication decision pending the disposal of litigation/arbitration:

> [43] *Besides ordering an Unconditional Stay, the court also has a discretion to grant a Conditional Stay pursuant to s. 16(2) CIPAA as follows*:
>
> (1) *the court may order that the adjudicated amount or a part thereof be deposited with the Director of the Asian International Arbitration Centre; or*
>
> (2) *a Conditional Stay may be granted on any term that the court "thinks fit"*.
>
> (emphasis added).

[23] I am of the following view regarding the exercise of the court's discretion to allow or not a conditional stay application:

(i) the burden to persuade the court to grant a conditional stay application rests solely on the party against whom an adjudication decision is delivered (X). The party in whose favour an adjudication decision is made (Y) has no onus to satisfy the court to dismiss a conditional stay application;

(ii) as a general rule, the court should not exercise its discretion to allow a conditional stay application (general rule). The reason for the general rule is because the object of the CIPAA (object (CIPAA)) is to ensure that parties who have performed "construction work" (as defined in s. 4 of the CIPAA), are paid for the construction work and are not deprived of cash flow (the life-blood of the construction industry) – please refer to the long title to CIPAA (CIPAA is to "facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide for remedies for the recovery of payment in the construction industry") and the judgment of the Federal Court delivered by Mohd Zawawi Salleh FCJ in *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2019] 5 AMR 516, at [51].

If a conditional stay application is allowed as a matter of course, this will defeat the object (CIPAA);

(iii) X has to persuade the court that there exist exceptional circumstances for the court to depart from the general rule and to grant a conditional stay application (exception); and

(iv) if X can show the existence of exceptional circumstances so as to warrant the exercise of the court's discretion to allow a conditional stay application, the exercise of such a judicial discretion is necessarily dependent on the exceptional circumstances of the case and the consequent written judgment cannot thereby constitute a binding legal precedent from the viewpoint of the doctrine of *stare decisis*.

[24] In this case, I am satisfied that MCB has discharged the burden to persuade the court to allow MCB's oral application (conditional stay). This is because there exist the following exceptional circumstances:

(i) this court may take judicial notice of the High Court's two enforcement orders (two adjudication decisions (19 January 2022 and 2 March 2022) and High Court's enforcement order (adjudication decision (21 March 2022)) (collectively referred to in this judgment as the "three High Court enforcement orders (three previous adjudication decisions)").

The three High Court enforcement orders (three previous adjudication decisions) have granted leave for KWSL to enforce three previous adjudication decisions – please refer to the above sub-paras. 4(2) to (4). In view of the three High Court enforcement orders (three previous adjudication decisions), KWLS is entitled to enforce against MCB the three previous adjudication decisions with regard to the following sums of money:

(a) a total sum of adjudicated amounts of RM3,335,766.98 (total adjudicated amounts (three previous adjudication decisions)); and

(b) interest on the total adjudicated amounts (three previous adjudication decisions) and adjudication costs as stipulated in the three previous adjudication decisions (total interest and adjudication costs (three previous adjudication decisions)); and

(ii) as KWSL can enforce against MCB the total adjudicated amounts (three previous adjudication decisions) and total interest and adjudication costs (three previous adjudication decisions), KWSL's cash flow would not be disrupted if the court invokes the exception in this case and grants MCB's oral application (conditional stay). In other words, the court's grant of a conditional stay of enforcement of the adjudication decision (29 July 2022) pending the outcome of MCB's suit (conditional stay order (adjudication decision (29 July 2022))) is not contrary to the object (CIPAA) as KWSL's cash flow is ensured by way of the three High Court enforcement orders (three previous adjudication decisions).

I must emphasise that the three High Court enforcement orders (three previous adjudication decisions) have persuaded me to apply the exception in this case and grant the conditional stay order (adjudication decision (29 July 2022)). If not for the three High Court enforcement orders (three previous adjudication decisions), I would have dismissed MCB's oral application (conditional stay) in accordance with the general rule.

[25] In view of the exceptional circumstances of this case as explained in the above para. 24, I exercise my discretion under s. 16(1)(b) read with (2) of the CIPAA to make the conditional stay order (adjudication decision (29 July 2022)) as follows:

(i) all forms of execution of the adjudication decision (29 July 2022) and commencement of winding up proceedings based on the adjudication decision (29 July 2022) are stayed on the condition that MCB shall deposit a total of:

(a) the adjudicated amount (29 July 2022);

(b) all interest on the adjudicated amount (29 July 2022) (as determined in the adjudication decision (29 July 2022)) as at 1 December 2022; and

(c) adjudication costs as stipulated in the adjudication decision (29 July 2022)

(sum (conditional stay order))

shall be deposited by MCB in an interest-bearing bank account in the name of KWSL's solicitors on or before 5pm, Friday, 23 December 2022 and KWSL's solicitors shall hold the sum (conditional stay order) (condition) as a stakeholder until the disposal of MCB's suit;

(ii) if the condition is not complied with by MCB, KWSL shall be entitled to execute the adjudication decision (29 July 2022) and/or institute winding up proceedings based on the adjudication decision (29 July 2022) as KWSL sees fit;

(iii) if the condition is fulfilled by MCB, the party who is successful in MCB's suit shall apply to the High Court for an order regarding the release of the sum (conditional stay order); and

(iv) parties have liberty to apply.

KWSL's OS

[26] KWSL's OS is allowed subject to the conditional stay order (adjudication decision (29 July 2022)).

A

Costs

[27] With regard to the costs of the two OS (costs), I exercise my discretion as follows:

(i) one set of costs for the two OS should be awarded as the two OS are
B heard together; and

(ii) MCB shall bear the costs because:

(a) the court has dismissed the setting aside application (MCB's OS) and absolute stay application (MCB's OS); and

C (b) MCB's solicitors did not give prior notice of MCB's oral application (conditional stay) to KWSL's solicitors.

Court's Decision

[28] In conclusion:

D (i) the setting aside application (MCB's OS) is dismissed;

(ii) the absolute stay application (MCB's OS) is refused;

(iii) the conditional stay order (adjudication decision (29 July 2022)) is granted as stated in the above para. 25;

E (iv) KWSL's OS is allowed subject to the conditional stay order (adjudication decision (29 July 2022)); and

(v) costs shall be paid by MCB to KWSL – please refer to the above sub-para. 27(2).

F

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H

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